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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

In re Lyft Securities Litigation,	Lead Case No. 4:19-cv-02690-HSG
This Document Relates to: ALL ACTIONS	**CLASS ACTION** OPPOSITION TO LYFT DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S CONSOLIDATED AMENDED CLASS ACTION COMPLAINT FOR VIOLATIONS OF FEDERAL SECURITIES LAWS

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PRELIMINARY STATEMENT

On March 28, 2019, Lyft, Inc. ("Lyft" or "Company") offered 32.5 million shares to the public through an initial public offering ("IPO") at a share price of $72.00, resulting in total proceeds of $2.34 billion. Two months after completion of the IPO, Lyft's stock price declined to under $54 per share, wiping out almost $600 million in shareholder investments.

As alleged in the Consolidated Amended Complaint ("AC"), the Amended Registration Statement ("Registration Statement" or "S-1/A") contained untrue statements of material fact and omitted material information that was required to be stated therein. These included facts concerning the serious and significant allegations of sexual misconduct by Lyft drivers. Indeed, while Lyft warned that "millennials," a key group of its consumers, are "likely to switch brands" if a company does not "communicate the results of corporate responsibility," Lyft concealed its serious sexual misconduct problem endangering its standing with millennials as well as its other key consumers: women. Lyft also touted a key metric in how investors could assess the profitability of its ride sharing segment, only to eliminate that key metric when reporting financial results just six weeks after the IPO, and failed to alert investors in the IPO that its quarter, ending just 3 days after the IPO, would result in a massive quarterly loss. Additionally, Lyft misrepresented its true national market share; a faltering bikeshare business that jeopardized Lyft's growth plans; and labor unrest severe enough to interfere with normal operations.

STATEMENT OF FACTS

Despite cultivating a reputation as a "safe, progressive alternative" for a "particular clientele," female riders (¶¶ 10, 92, 93, 95),[1] Lyft had an alarming problem prior to its IPO: pervasive sexual assaults by drivers against Lyft passengers. ¶¶ 12, 111, 128–29. Yet the S-1/A made no mention of sexual violence, the pending or potential litigation, or that there was even a risk of such events. ¶¶ 13,

[1] Citations to "¶" are to the Consolidated Amended Class Action Complaint (ECF No. 74).

117. The AC identifies 53 separate instances of sexual assault involving Lyft drivers, including 43 Lyft was aware of,[2] yet Lyft did not disclose these violent crimes. ¶ 111. Indeed, in the days immediately following a viral tweet on April 7 about Lyft drivers sexually victimizing riders and a subsequent San Francisco Chronicle story on April 9, Lyft's stock price plummeted 20%. ¶ 120.

Lyft's S-1/A also highlighted "Bookings" and "Revenue as a Percentage of Bookings" as key indicators of growth and assured investors of expected increases, but omitted that Lyft had decided to abandon these metrics, leading to harsh criticism from the investment community. ¶¶ 18, 20, 143–46, 149–50. Lyft's S-1/A similarly made no mention that Lyft was three days from closing its worst ever quarter with $1.14 billion in losses, with non-stock compensation losses nearly three times higher than analysts' projections. ¶¶ 22–23, 153.

Soon after the IPO, analysts determined Lyft's market share was significantly lower than what Lyft claimed in the S-1/A. ¶¶ 15–16, 136. Lyft had also "aggressively invest[ed]" in the bikeshare market (¶ 185), committing $351 million to its bikeshare business. ¶¶ 24, 159. The S-1/A explained that Lyft's "business in part depends on" growing and developing bikesharing (¶ 187), but failed to disclose that Lyft knew its fleet was defective and that dozens of riders were injured as a result. ¶¶ 171–73, 175, 177–81. Just two weeks after the IPO, Lyft was forced to remove thousands of electric bikes from service, causing its stock price to plummet. ¶¶ 176, 184. Finally, the S-1/A touted the "best-in-class" benefits Lyft drivers enjoyed but did not disclose that Lyft's policies were creating labor unrest that had already resulted in a strike in Los Angeles just days before the IPO. ¶¶ 28, 30, 194–98.

PLEADING STANDARDS

Plaintiff's claims arise under Sections 11 and 15 of the Securities Act of 1933, 15 U.S.C. §§ 77k

[2] Figure includes primarily those incidents directly reported to Lyft as well as those referenced in litigation or criminal charges, and in one instance an incident reported by the Washington Post.

and 77o, respectively. "To establish a *prima facie* § 11 claim, a plaintiff need show only [1] that he bought the security and [2] that there was a material misstatement or omission." *Hildes v. Arthur Andersen LLP*, 734 F.3d 854, 860 (9th Cir. 2013) (quotations and citation omitted). Section 15 imposes secondary liability on those who "control[] any person liable under [Section 11]". 15 U.S.C. § 77o(a). Pursuant to Federal Rule of Civil Procedure, Rule 8, only a "short and plain statement of the claim showing that the pleader is entitled to relief" is required.[3] Plaintiff need not plead scienter, reliance, or loss causation. *Hildes*, 734 F.3d at 859. The AC readily satisfies these standards.

ARGUMENT

"The Supreme Court has recognized that Section 11 'places a relatively ***minimal burden*** on a plaintiff.' . . . ***'Liability against the issuer of a security is virtually absolute, even for innocent misstatements.'"*** *Hildes*, 734 F.3d at 859 (emphasis added). Moreover, adequacy of disclosures is a "***factual question***,"[4] which is only suitable for resolution at the motion to dismiss stage where the defendant has met the "***stringent showing***"[5] that cautionary language is "***sufficient as a matter of law***." Defendants fall far short of this rigorous standard; the Motion to Dismiss should therefore be denied.

I. Plaintiff adequately pleads the S-1/A contained untrue statements.

As discussed, the Registration Statement contained materially untrue statements and omitted to disclose facts necessary to make the statements made therein not misleading. Defendants also had an independent, affirmative duty, which they failed to fulfill to: (1) provide adequate disclosures about "any

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[3] Fed. R. Civ. P. 8(a)(2). The heighted pleading standards of Rule 9(b) do not apply, as Plaintiff's claims do not sound in fraud. ¶ 36. Defendants do not argue otherwise.

[4] *In re Surebeam Corp. Sec. Litig.*, 2005 WL 5036360, at *13 (S.D.Cal. Jan. 3, 2005) ("Adequacy of disclosure under Item 303 is a factual question and adequacy of disclosure is normally a jury question.") (quotations omitted).

[5] *Rafton v. Rydex Series Funds*, 2011 WL 31114, at *9 (N.D.Cal. Jan. 5, 2011) ("Defendants have not satisfied the 'stringent showing' necessary to establish that their disclosures and cautionary language were sufficient as a matter of law.").

known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations" (17 C.F.R. § 229.303(a)(3)(ii), "Item 303"); and (2) disclose a "discussion of the most significant factors that make the offering speculative or risky" (17 C.F.R. § 229.105, "Item 105") (formerly Item 503(c)).

A. Plaintiff has adequately alleged that Lyft's statements about safety were misleading and omitted material information.

Lyft branded itself as the safe choice for ride sharing, targeting its marketing at intoxicated young women in particular (¶ 94), while knowing full well ***prior to the IPO***, that it had a rampant sexual assault problem that posed severe reputational damage and legal liability. ¶ 111. This was material information, the disclosure of which "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[6]

1. Defendants' generic disclosures were inadequate.

Defendants argue that references to the term "accidents or other trust and safety incidents"[7] on one page and the term "assault" on another adequately informed investors that Lyft drivers engaged in numerous and serious sexual assaults of customers.[8] Defendants go so far as to assert that "assault" and (separately) "trust and safety incidents" "*more* accurately and completely disclose both the 'physical and sexual' assaults that Plaintiff claims were omitted."[9] This contention is absurd and offensive.

First, Defendants raise a factual argument regarding "whether adverse facts were adequately

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[6] *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988).
[7] S-1/A at F-31. To clarify, the "accidents *or trust and safety incidents"* language is not even in "Risk Factors," but rather in a different part of the S-1/A altogether. *See id.* at 163.
[8] *Id.* at 28. In their "Statement of Facts," Defendants also point to the fact that they disclosed Lyft's termination of the company's policy of mandatory arbitration of sexual misconduct claims. Motion to Dismiss at 5. Modification of the company's forced arbitration policy reveals nothing about the extent of the company's sexual assault problems. However, the existence of the policy represents another impediment to information about sexual misconduct at Lyft becoming public prior to its cessation, further undercutting Defendants' "truth on the market" defense. *See* Section I.A.3. *infra.*
[9] Motion to Dismiss at 10 (emphasis in original).

disclosed" but cannot show that the adequacy of their disclosures was "so obvious that reasonable minds [could] not differ." *In re Snap Inc. Sec. Litig.*, 2018 WL 2972528, at *6 (C.D.Cal. June 7, 2018) (quoting *In re Syntex Corp. Sec. Litig.*, 95 F.3d 922, 926 (9th Cir. 1996)). A reasonable investor would understand "safety" issues to relate to a driver's failure to engage in safe driving and "trust" issues to relate to, *e.g.,* misuse of a user's credit card or account information or perhaps unfairly "running up the meter." Sexual assaults –*violent sexual crimes* that were perpetrated by Lyft drivers – are vastly different and labeling them as merely "other trust and safety incidents" impugns the trauma suffered by the victims and fails to adequately inform investors of the truth. *See Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982, 987 (9th Cir. 2008) ("Absent undisputed evidence that these were terms of art that investors would have understood to refer to [omitted facts], we cannot find, as a matter of law, that defendants disclosed [the omitted facts]"); *In re Atossa Genetics Inc. Sec. Litig.*, 868 F.3d 784, 797-98 (9th Cir. 2017) (holding warning of "other matters" in FDA letter was so vague it "hid the ball" and "obscure[d] the [specific] issue of concern to reasonable investors.").

Similarly, the term "assault" (which appears *once* in the S-1/A) does not, without more, convey the seriousness of the *sexual* assault issue Lyft faced at the time of its IPO. Indeed, rather than even warning directly of driver "assaults," Lyft further obscured the issue by warning investors of:

> Illegal, improper or otherwise inappropriate activities **by users**, including the activities of individuals who may have **previously engaged with**, but are not then receiving or providing services offered through, our platform or individuals who are intentionally **impersonating** users of our platform ***could*** **adversely** affect our brand, business, financial condition and results of operations. **These activities *may* include assault**, theft, unauthorized **use of credit** and debit cards or bank accounts, sharing of rider accounts and other misconduct. . . . [Our preventative] **measures *may not* adequately address** or prevent all illegal, improper or otherwise inappropriate activity by these parties from occurring in connection with our offerings.

S-1/A at 28. Lyft shifts attention from active drivers to "users" who may have engaged in the inappropriate conduct but who are not "providing services" for Lyft, without acknowledging the pervasive problem of authorized Lyft drivers committing *sexual* assaults. *See Credit Suisse First Boston*

Corp. v. ARM Fin. Grp., Inc., 2001 WL 300733, at *4 (S.D.N.Y. Mar. 28, 2001) ("*ARM Financial*") ("A prospectus will violate the federal securities laws if material facts have been omitted or presented in such a way as to obscure or distort their significance, submerged in a flood of collateral data, or treated in a cavalier manner.") (internal quotations omitted). Plus, the conditional use of "could" and "may," where Lyft had a then-existing, serious sexual assault problem, further undermines the sufficiency of this disclosure. Defendants cannot hide behind generic disclosures, as they had an obligation to reveal facts critical to appreciating the magnitude of the risks. *Rafton*, 2011 WL 31114, at *8 ("Defendants overstate the extent of their disclosures," which were "***general and ambiguous***" and "***failed to disclose the magnitude of the risk***") (emphasis added); *see also In re Am. Intern. Grp., Inc. 2008 Sec. Litig.*, 741 F. Supp. 2d 511, 532 (S.D.N.Y. 2010) ("[***G***]***eneral disclosures*** cited by [Defendants] were insufficient to fulfill Defendants' disclosure obligations . . . in light of the ***undisclosed hard facts critical to appreciating the magnitude of the risks described***. . . .") (internal quotations omitted) (emphasis added).

ARM Financial is a useful comparison. There, the prospectus "warned investors of numerous risk factors associated with [defendant's] business that could (and ultimately did) lead to reduced revenues and losses," including spread compression, increase in surrenders, and vulnerability to rating downgrade.[10] Despite these disclosures – which were far *more* detailed and specific than the disclosures on which Defendants here rely – the court denied a motion to dismiss, reasoning that "warnings of specific risks like those in the [prospectus] do not shelter defendants from liability ***if they fail to disclose hard facts critical to appreciating the magnitude of the risks described***." *Id.* at *8 (emphasis added).[11] The rampant problem of Lyft drivers committing sexual assaults constituted "hard facts critical to

[10] *ARM Financial*, at *7-8.

[11] *See also id.* at *9 ("[whether] the disclosures were substantial enough to render the risk unimportant to reasonable investors . . . is a matter properly resolved later in this litigation.").

appreciating the magnitude of the risks described." *Id.* at *8.

2. Plaintiff's allegations are based on Defendants' failure to disclose hard facts, not on quibbles about word choice.

Attempting to deflect attention from Lyft's deficient disclosures, Defendants argue that "Lyft had no obligation to use the precise term Plaintiff would have wanted."[12] This is a red herring. Indeed, there are any number of terms Defendants could have used to convey the truth, including (among others) "rape," "grope," "kidnap and sexually violate," "nonconsensual," "sexual battery," in addition to "sexual assault." What Lyft could not do was use a term that was so imprecise (*i.e.,* "accidents or other incidents" or simply "assault") that a reasonable investor would have been misled by its use. *See Berson*, 527 F.3d at 986-87 (with "benefit of hindsight and some help from the brief[]," court could see defendants' interpretation; however disclosures were misleading because "it's far from clear that a reasonable investor could have decoded this meaning at the time.").

Belodoff v. Netlist, Inc., relied on by Defendants, provides a useful foil to the present facts. 2009 WL 1293690 (C.D.Cal. Apr. 17, 2009). There, where defendants disclosed the dollar value of excess inventory, the Court dismissed plaintiff's argument that "Defendants failed to disclose that excess inventory had reached 'excessive' levels. . . ." *Id.* at *8. The key distinction, however, is that the *Bedoloff* defendants *disclosed the facts at issue*, *i.e.,* the excessive inventory, whereas here, Lyft disclosed nothing about its drivers' sexual offenses. The *Bedoloff* complaint amounted to "a dispute about the characterization of the facts rather than any allegation that Netlist failed to disclose the facts themselves." *Id*. at *9 (emphasis added). In contrast, here Lyft failed to disclose "the facts themselves." ¶ 131 ("[t]he Registration Statement ***fails to even mention sexual assault at all***"); *cf. Belodoff*, 2009 WL 1293690, at *9 ("Netlist clearly delineated the levels of inventory at and leading up to the IPO. . . .

[12] Motion to Dismiss at 10.

Netlist was [not] obliged to label that inventory excessive. . . ."). *See ARM Financial*, at *8 (disclosures "do not shelter defendants from liability if they fail to disclose hard facts critical to appreciating the magnitude of the risks described.").

3. Sporadic media reports are insufficient to support a "truth on the market" defense, particularly on a motion to dismiss in a Securities Act case.

Plaintiff alleges scores of sexual assaults were reported to Lyft, but were not known to the general public prior to the IPO. ¶ 111. The AC further supports an inference that Lyft knew the actual rate of sexual assaults taking place was much higher than what was reported in the media by several orders of magnitude. ¶ 129. To the best of counsel's knowledge, the AC, which represents extensive investigative work by counsel drawing largely from accounts of sexual violence not available prior to the IPO, constitutes the most comprehensive public accounting of Lyft sexual assaults to date. What is critical is that these sexual offenses occurred *before* the IPO and Lyft knew about them. ¶¶ 111, 129.

Defendants now seek to leverage Plaintiff's investigatory work to support a premature "truth on the market defense."[13] The tactic fails for several reasons. *First*, "investors are not generally required to look beyond a given document to discover what is true and what is not." *Miller v. Thane Int'l, Inc.*, 519 F.3d 879, 887 (9th Cir. 2008). This is particularly true in Securities Act cases, where "[l]iability against the issuer of a security is virtually absolute, even for innocent misstatements."[14]

Second, "the fact that some information . . . was publicized does not mean that all of the relevant . . . information was also made public. . . ." *Schulein v. Petroleum Dev. Corp.*, 2012 WL 12884851, at *6 (C.D.Cal. June 25, 2012) ("mere presence in the media of sporadic news reports does not give shareholders sufficient notice that proxy solicitation . . . may be misleading.") (quoting *United Paperworks Intern. Union v. Int'l Paper Co.,* 985 F.2d 1190, 1198-99 (2d Cir. 1980)). Plaintiff cites

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[13] *See* Motion to Dismiss at 10-11.
[14] *Hildes*, 734 F.3d at 859 (internal quotations omitted).

scores of incidents not reported in the media. ¶ 111. Plus, Lyft's lack of any mention of sexual crimes would lead a reasonable investor who was aware of the media reports to assume that, while there might be some claims of sexual assaults, their incidence is so rare that it does not even warrant being mentioned in the S-1/A. Yet, investors were surprised by the April 7 revelations as the stock fell steeply. ¶ 120.

Third, "the truth-on-the-market defense is intensely fact-specific" and thus "courts rarely dismiss on this basis" even where – unlike here – heightened pleading standards apply. *Nguyen v. Radient Pharm. Corp*, 2011 WL 5041959, at *7 (C.D.Cal. Oct. 20, 2011) (§ 10(b) case). "Before the truth-on-the market defense can be applied, the defendant must prove that the information that was withheld or misrepresented 'was transmitted to the public with a degree of intensity and credibility sufficient to effectively counterbalance any misleading impression created by [an] insider's one-sided representations.'" *Id.* (quoting *Provenz v. Miller,* 102 F.3d 1478, 1492-93 (9th Cir. 1996)). This burden is particularly heavy in a Section 11 case. *See In re Citigroup Bond Litig.,* 723 F. Supp. 2d 568, 590 n.6 (S.D.N.Y. 2010) ("while defendants may be able to ultimately defeat liability by establishing such proof, ***it is impossible to establish that defense at this stage of the proceedings.***").

In relying on *Vignola v. FAT Brands, Inc.*, 2019 WL 6138473 (C.D.Cal. June 14, 2019) ("*Vignola I"*) to support their "truth-on-the-market" defense,[15] Defendants overlook the court's subsequent decision in the same case. Following *Vignola I*, plaintiffs filed an amended complaint alleging that the omitted information, while technically public, "was not well-known to investors." *See Vignola v. FAT Brands, Inc.*, 2019 WL 6888051, *11 (C.D.Cal. Dec. 17, 2019) ("*Vignola II*").[16] The court refused to dismiss, explaining: "the fact that these bankruptcies were ***publicly disclosed does not bar*** the claims from being material at the pleading stage. . . . The allegation that the bankruptcies were

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[15] Motion to Dismiss at 11.

[16] The court applied the heighted pleading standards of Rule 9(b), which are not applicable here.

'not well-known' combined with the other allegations explain why disclosure would have altered the 'total mix' of information made available to investors, ***is sufficient***." *Vignola II*, at *11.[17]

Here, the AC alleges that much of the omitted information was *not* publicly available such that the *magnitude* of the problem was concealed and, even where certain information was in the public domain (*i.e.* where a lawsuit had been filed against the Company), the information was not well known to the general public before the IPO. ¶ 111 ("The examples below—most of which were not publicly known until after the IPO—illustrate just how pervasive Lyft's sexual assault and safety problems were prior to the IPO."). The AC further alleges that there were significant impediments to obtaining information about the scope of the problem:

> [A]n April 30, 2018 CNN report . . . highlighted ***difficulties in gathering information*** because '***there is no publicly available data for the number of sexual assaults' by rideshare drivers***. [A September 2019 complaint] alleges that despite the 'knowledge that adopting a policy of mandatory reporting [of rape and sexual assault] will help prevent future assaults and increase passenger safety,' ***Lyft does not report such allegations to the police***.[18]

Defendants fall far short of demonstrating a viable truth-on-the-market defense, which in any event is premature at this stage of the proceedings.[19]

4. Defendants' "hindsight" argument misconstrues Plaintiffs' allegations and the facts, thus providing no support to Defendants' motion to dismiss.

Defendants erroneously claim that Lyft's problems with drivers committing sexual assaults didn't start until *after* the IPO, when the San Francisco Chronicle published an article about the

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[17] In *Sanchez v. IXYS Corp.,* 2018 WL 4787070 (N.D.Cal. Oct. 2, 2018), the other case on which Defendants rely, the court concluded that the omitted analyst projections were publicly available, "easily obtainable and already in the total mix of information that a reasonable investor would look to." *Id.* at *3-4. Moreover, the case was subject to the heightened pleading standards of 9(b). The case is therefore readily distinguishable and unpersuasive.

[18] ¶ 129.

[19] *See Citigroup Bond Litig.,* 723 F. Supp. 2d at 590, n.6.

Company's sexual assault problem.[20] *First*, Plaintiff has cited ten lawsuits arising from sexual violence by Lyft drivers that were ***initiated prior to the IPO***. ¶ 111. *Second*, the AC alleges 53 incidents of sexual violence ***occurring prior to the IPO***, 43 of which were ***reported to Lyft***, directly (by victims and/or law enforcement) or indirectly, ***prior to the IPO***. *Id.* Plaintiff further alleges facts that give rise to an inference that far more sexual assaults were taking place in the lead up to the IPO (¶ 129), information that would be uniquely within Lyft's knowledge. *Third*, the AC alleges that the pervasive sexual assault problem posed not just legal liability, but also severe reputational damage to Lyft, which had touted itself as the safe choice for ride sharing, marketing itself in particular to young, millennial women as the safe choice for getting home after a night out. ¶ 94.

In fact, Lyft admitted that its "users are loyal" because "of our . . . commitment to social responsibility," ¶ 105, and that "88% of millennials," key users of Lyft's services, "expect companies to produce and communicate the results of corporate responsibility." ¶ 106. It should be no surprise, then, that Lyft's stock plunged between April 8 and 10, as the viral twitter story and San Francisco Chronicle article not only undercut Lyft's claims of its "commitment to social responsibility" but alerted investors to the fact that Lyft faced a real problem with key consumer groups, *i.e.,* women and millennials, because of its undisclosed sexual assault problem.

5. Defendants are not shielded by a misleading disclosure stating that no legal proceeding was "*individually*" likely to have a material impact.

Defendants argue that "Lyft properly disclosed its opinions that '[t]here is no pending or threatened legal proceeding that has arisen from these incidents . . . [involving drivers] that ***individually***,

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[20] *See* Motion to Dismiss at 11; *see also id.* at 12 ("Plaintiff does not allege that *at the time of the IPO* Lyft was already facing the 'avalanche' of lawsuits that Plaintiff contends were prompted by the [April 9] *San Francisco Chronicle* article."). With respect to the April 9 article, what Plaintiffs actually allege is: "Since then, Lyft has faced an avalanche of complaints and negative press about sexual assaults committed by Lyft drivers and the Company's responses." ¶ 121.

in our opinion, is likely to have a material impact of our business, financial condition or results of operations.' . . . Plaintiff fails to allege any facts suggesting Lyft believed[21] something different at the time of the IPO."[22] This argument misses the point: Lyft did not disclose *any* sexual assaults, let alone the barrage of sexual assault complaints that had been, and were continuing to be, lodged against its drivers. It also bears noting that the Company reported numerous other types of lawsuits against the Company, including violations of the Telephone Consumer Protection Act and the Americans with Disabilities Act. S-1/A at 160–63.

6. Lyft's statements about safety were misleading for the additional reason that Lyft omitted material information about the Company's safety and response policies.

Lyft touted safety as one of its "principal competitive factors" (¶ 104), "paramount to [Lyft's] success" (¶ 108), and the company's "top priority" (*id.*),[23] while omitting to disclose material information about the Company's safety and response policies, including Lyft's practice of: keeping drivers alleged to have sexually assaulted women active but simply promising not to pair victims with their abusers again (¶¶ 111, 120); stonewalling criminal investigations (¶¶ 14, 126); refraining from providing adequate sexual assault training to avoid drivers being classified as employees (¶¶ 112, 196); failing to implement basic safety features (¶ 112); and failing to implement (as Uber had done in 2018) a "continuous background check" policy (*id.*). Far from "provid[ing] a high quality of care," Lyft's Critical Response Line minimized serious reports of sexual violence against riders by, *e.g.*, offering sexual assault victims $5 coupons. ¶¶ 109, 111, 120. Accordingly, Lyft's statements about its safety policies were misleading and omitted material information.

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[21] More fundamentally, what Defendants "believed" amounts to a fact-intensive due diligence defense wholly inappropriate on a motion to dismiss. *E.g. Fed. Deposit Ins. Corp. v. Morgan Stanley Capital I Inc.*, 2015 WL 1381875, at *8 (D. Colo. Mar. 24, 2015) (collecting cases).

[22] Motion to Dismiss at 11 (emphasis added).

[23] Lyft similarly described "trust" as "the foundation of our relationship with drivers . . ." ¶ 109.

Citing *In re Restoration Robotics, Inc. Sec. Litig.,* 417 F. Supp. 3d 1242 (N.D.Cal. 2019), Defendants argue "a Section 11 claim must be based on 'falsity, not inadequacy'" of a company policy.[24] *Restoration* involved in relevant part statements about the company's "clinical training and marketing support to customers." *Restoration Robotics*, 417 F. Supp. 3d at 1258. As the court explained, the plaintiff "[took] issue with the methods used by Defendants ***and ground[ed] [its] argument in what would have [been] 'proper' service to doctors***." *Id*. Here, Plaintiff is not arguing about what Lyft could have or should have done as a company. *Cf. id.* at 1259 ("Plaintiffs cannot use the benefit of 20-20 hindsight to turn management's business judgment into securities fraud.") (quoting *In re Worlds of Wonder Sec. Litig.,* 35 F.3d 1407, 1419 (9th Cir. 1994)). Rather, Plaintiff alleges that when Lyft chose to speak about its safety measures, it had a duty to do so truthfully, disclosing all material information. *See In re Equifax Inc. Sec. Litig.*, 357 F. Supp. 3d 1189, 1219-1220 (N.D.Ga. 2019) ("[g]iven the dangerously deficient state of Equifax's cybersecurity. . . it was false, or at least misleading, for Equifax to tout its advanced cybersecurity protections."). *See also Berson*, 527 F.3d at 987.

7. The Complaint alleges that Lyft's "risk disclosures" were misleading.

Defendants mistakenly claim that Lyft's risk disclosures do not support a claim because Plaintiff "nowhere alleges that as a result of the alleged liability, assaults, or supposedly inadequate safety policies, Lyft had, at the time of the IPO, already suffered harm to its 'business, brand, financial condition and results of operation.'"[25] *First*, Plaintiff alleges that the Company's risk disclosures were

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[24] Motion to Dismiss at 12. Defendants also cite *Bondali v. Yum! Brands, Inc.,* 620 F.App'x. 483 (6th Cir. 2015) (a 10(b) case at summary judgment) and *Altayyar v. Etsy, Inc.* 242 F. Supp. 3d 161, 175 (E.D.N.Y. 2017) for the argument that "Lyft did not purport to guarantee its safety policies could prevent all illegal conduct." Motion to Dismiss at 13. Plaintiff does claim otherwise. However, when Lyft chose to speak to investors about those safety policies, it had a duty to be truthful and not omit material information about those safety policies and how they did not prevent the Company's pervasive sexual assault problem. *See Berson*, 527 F.3d at 987.

[25] Motion to Dismiss at 13.

materially misleading because Lyft failed to even disclose that sexual assault was a *risk* to the Company (¶ 117), even though the risk was particularly acute given Lyft's decision to brand itself as the safe choice for ride sharing. ¶ 94. In essence, Defendants' argument starts with the faulty premise that the risk of sexual assault was in fact disclosed (it was not) and then concludes that the Complaint does not allege that this purportedly-disclosed risk had harmed the company (though it does just that, as discussed below).

Second, contrary to Defendants' argument that Plaintiff "nowhere alleges" that Lyft had already suffered harm,[26] the Complaint expressly alleges that Lyft had been sued ten times over sexual assault (¶ 111)[27] and that:

> [T]he Company ***faced serious reputational damage and legal liability from pervasive incidents of assault***, both physical and sexual, perpetrated by Lyft drivers ***prior to the IPO*** (¶ 110) . . . . The 'Risk Factors' provided in the Registration Statement were materially misleading. . . because they described the risks as hypothetical possibilities, despite the fact that ***the warned of risks had already occurred and continued to occur*** (¶ 116).

Thus, the Complaint does allege that "Lyft had, at the time of the IPO already suffered harm."[28] To the extent Defendants seek to debate the impact to Lyft's business, brand, or financial condition, they raise a question of fact not appropriate for resolution on a motion to dismiss. *Snap*, 2018 WL 2972528 at *4.[29]

Williams v. Globus Med., Inc., on which Defendants rely, is inapposite. 869 F.3d 235 (3d Cir. 2017). There, plaintiff challenged a company's failure to disclose its decision to terminate one of its distributors. *Id.* at 237-38. However, when the alleged misstatements were made, (i) the distributor was

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[26] Motion to Dismiss at 13.
[27] Lyft had also already made business changes driven by reputational pressure. *E.g.* ¶ 128.
[28] Motion to Dismiss at 13.
[29] This is particularly true where, as here, Plaintiff alleges that Lyft failed to disclose its pervasive sexual assault problem in its Registration Statement. ¶ 131. Lyft should not be able to avoid liability for misstatements because it hid the truth, thus postponing the day of full reckoning.

still distributing the company's products and (ii) the company had gone to great lengths to prevent any negative impact from the termination. *Id.* at 242-43. In short, there was no reason to expect, when the statements were made, that the termination of the distributor would adversely affect the company. In contrast, Plaintiff has alleged that, at the time the "Risk Factors" were disclosed, Lyft "faced serious reputational damage and legal liability". ¶ 110. Neither the facts nor the law support Defendants' contrary argument.[30]

8. Defendants' attempts to recast their misstatements and omissions about safety as corporate optimism and subjective belief are unavailing.

Defendants attack the misrepresentations alleged at ¶¶ 103–09 as "statements of corporate optimism and subjective belief that do not support a claim."[31] In particular, Defendants highlight the statements, "[w]e believe that the principal competitive factors . . . include . . . trust [and] safety" and "[t]rust is the foundation of our relationship with drivers and riders."[32] The referenced statements are actionable because: (a) the optimistic statements created a "positive impression" of an area in which Lyft knew it was "doing poorly" (*i.e.,* safety); and (b) the opinion statements about safety "did not align" with the negative information regarding sexual assaults and related litigation known to Lyft at the time of the statements. *In re Apple Inc. Sec. Litig.,* 2020 WL 2857397, *15-16 (N.D.Cal. June 2, 2020) ("*Apple*").

a. The misrepresentations alleged at ¶¶ 103–109 were not mere puffery.

Lyft touted safety as one of its "principal competitive factors," "paramount to [Lyft's] success," and the company's "top priority,"[33] while omitting to disclose that the Company faced a pervasive sexual

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[30] Defendants also rely on *In re Facebook, Inc., Sec. Litig.,* 405 F. Supp. 3d 809 (N.D.Cal. 2019). Unlike Plaintiff here, the Facebook plaintiffs did not allege harm occurring at the time of the risk disclosures. *See Id.* at 841.
[31] Motion to Dismiss at 14.
[32] *Id.* (emphasis omitted).
[33] ¶¶ 104, 108.

assault problem and resulting litigation. *See* ¶ 111. As this Court quite recently explained, "[a]lthough investors understand that corporate optimism may be unreliable, a party cannot affirmatively create a positive impression of an area it knows to be doing poorly." *Apple*, at *15. By touting the central importance of safety without addressing the scores of sexual assaults and lawsuits (¶ 111),[34] Lyft "affirmatively create[d] a positive impression" regarding safety at the Company, when in fact Lyft knew that it was "doing poorly" in this area. *Apple*, at *15; *see also In re Massey Energy Co. Sec. Litig.*, 883 F. Supp. 2d 597, 617-18 (S.D.W.Va. 2012) (company statements about "commitment to corporate values" and "claim of industry leadership in safety and compliance" were not "immaterial puffery" because "the truth or falsity of Defendants' statements can be determined. They are not stated in a context of a future prediction, but generally recognize the company's past achievements and current goals."); *cf. Warshaw v. Xoma Corp.*, 74 F.3d 955, 960 (9th Cir. 1996) (finding misleading "optimistic statements [that] allegedly contravened the unflattering facts in Xoma's possession.").

Context further supports a finding that the statements are actionable. *Id.* at 959 ("general statements of optimism, when taken in context, may form a basis for a securities fraud claim."). By "***closely align[ing] their statements of commitment to safety to their productivity and success as a company***," defendants "len[t] credence to the materiality of their statements," thus rendering those statements actionable. *Massey*, 883 F. Supp. 2d at 618 (emphasis added); *cf. e.g.*, ¶ 108 ("Safety is our top priority, and . . . trust and ***safety is paramount to our success***.").[35]

b. Lyft's positive statements of opinion about safety did not align with the information known to Lyft and are therefore actionable.

The Supreme Court has emphasized that opinions expressed in Registration Statements must be

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[34] Plaintiff further alleges that the data on sexual assaults recounted in the AC almost certainly underestimates the actual rate of sexual assaults taking place and known to Lyft. ¶ 129.

[35] *See also* ¶¶ 103–07, 109.

considered and grounded in fact. *See Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 190 (2015) ("Registration statements as a class are formal documents, filed with the SEC as a legal prerequisite for selling securities to the public. Investors do not, and are right not to, expect opinions contained in those statements to reflect baseless, off-the-cuff judgments."). A "plaintiff may show that a statement of fact contained within an opinion statement is materially misleading because it is untrue" and "may also raise an omission theory by alleging facts going to the basis of the [speaker's] opinion . . . whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context." *Apple*, at *15 (internal quotations omitted).

In *Apple*, the defendant, as part of a discussion about emerging markets, stated, "'[i]n relation to China specifically, I would not put China in that category. Our business in China was very strong last quarter. . . . iPhone, in particular, [had] very strong double-digit growth there.'" *Id.* at *16. The court noted that, although the statement may have been literally true, it suggested that business in China continued to be strong. *Id.* The court concluded the plaintiff adequately alleged that the statement was misleading because "[e]ven when framed as an opinion, a reasonable investor 'expects not just that the issuer believes the opinion (however irrational), ***but that it fairly aligns with the information in the issuer's possession at the time.'"*** *Id.* (quoting *City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc.,* 856 F.3d 605, 615 (9th Cir. 2017)).

Lyft's statements that touted safety as a "***principal competitive factors***," "***paramount to [Lyft's] success***," and the company's "***top priority***,"[36] did not align with the information in Lyft's possession, *i.e.,* that the sexual assaults committed by Lyft drivers were rampant. ¶¶ 91, 111[37]; *see also Atossa Genetics Inc. Sec. Litig.*, 868 F.3d at 802 (opinion statement misleading where it expressed optimism

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[36] ¶¶ 104, 108.
[37] More generally, *see* ¶¶ 91–135.

about FDA clearance without disclosing specific FDA warnings about clearance).

Plaintiff has adequately alleged that the statements detailed at ¶¶ 103–109 are actionable.

9. Lyft's sexual assault problem was a "known trend" and significant risk factor that Defendants had an independent, affirmative duty to disclose under Reg. S-K.

As of the date of the IPO, Lyft knew of at least 43 incidents of sexual violence, and had been sued at least ten times. ¶ 111. Plus, as alleged, Lyft refused to institute driver training for fear of its drivers being classified as employees, rather than independent contractors. ¶ 112. These crimes were harming, and were more than reasonably likely to continue to harm, Lyft through litigation, as well as by threatening Lyft's reputation for safety among its target "clientele," the very thing Lyft identified as its competitive advantage over its chief rivals. ¶¶ 93, 108, 111, 124. Lyft's pervasive sexual assault problem therefore constituted a "known trend[] or uncertaint[y]" that Defendants had an affirmative duty to disclose to investors. *See* Item 303 (duty to disclose "any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations"); *see also Mingbo Cai v. Switch, Inc.*, 2019 WL 3065591, at *5 (D. Nev. July 12, 2019) (where a serious risk of diminution in revenue due to an event had already occurred, violation of Item 303 not to disclose it); *see also Silverstrand Invs. v. AMAG Pharm., Inc.*, 707 F.3d 95, 103-04 (1st Cir. 2013) (company violated Items 303 and 105 by failing to disclose twenty-three reports of serious adverse effects even though it had stated safety was key to competing in the drug market); *Panther Partners Inc. v. Ikanos Commc'ns*, *Inc.*, 681 F.3d 114, 117, 120-22 (2d Cir. 2012) (negative customer reports created "uncertainty" regarding possible recalls and "generic cautionary language" was insufficient). Item 105 further imposes an affirmative duty on management to include a "discussion of the most significant factors that make the offering speculative or risky." 17 C.F.R. § 229.105. Lyft's "boilerplate" disclosures, which failed to disclose "specific risks" jeopardizing Lyft's ability to market itself to its most important customer demographics, violated this

requirement. *Mingbo*, 2019 WL 3065591, at *6; *Silverstrand*, 707 F.3d at 103; *supra* Section I.A.7.

B. Lyft misled investors on availability of key metric and a massive first quarter loss.

1. Lyft led investors to believe that a key metric would be available to investors.

The Registration Statement repeatedly touted "Bookings" and "Revenue as a Percentage of Bookings" as key metrics for investors to "evaluate our business, measure our performance, identify trends affecting our business, formulate business plans and make strategic decisions." ¶ 143. These two metrics were central to the S-1/A's discussion of the Company's revenue growth in the years leading up to the IPO. ¶ 146. Indeed, the Registration Statement presented the metrics as the "key indicator" to decode "the utility of transportation solutions provided through our multimodal platform, as well as the scale and growth in our business." ¶ 144. Yet, six weeks following the IPO, these metrics had vanished (¶ 147), leaving investors and analysts to guess the true nature of Lyft's performance (¶ 148).

In *Miller*, the prospectus at issue touted the potential listing on Nasdaq as a key benefit of the merger, when in fact Defendants had decided that the merged entity's shares would not trade on Nasdaq in the near term. *Miller*, 519 F.3d at 883, 886-87. The Ninth Circuit found the prospectus misleading, stating that the "fair and reasonable implication an ordinary investor would derive" was that the company would continue to seek Nasdaq approval. *Id*. at 886-87. Similarly here, while touting growth as a principal reason to invest, Lyft omitted to disclose that it had decided to lock investors out of the "key indicator" for evaluating their investment. ¶ 144. As one financial news reporting source described it, Lyft began "life as a public company by taking away crucial information for investors." ¶ 150. As a result, investors were denied the level of insight and transparency into the Company's key operations that they were led to believe would be available based on the Company's prominent promotion of these metrics in the Registration Statement. Lyft's failure to disclose that it would no longer report these "key"

metrics was thus misleading.[38]

2. Defendants failed to disclose that a massive, first quarter loss loomed.

Lyft set its IPO date a mere three days before its 2019 first quarter close. ¶ 155. The Registration Statement failed to disclose, however, that Lyft would suffer its largest ever loss in the first quarter of 2019. *Id.* Although Defendants claim the loss was attributable to compensation charges, the Company's adjusted loss, excluding the compensations charges, was $211 million or approximately $9 per share, which drastically exceeded analysts' expected losses of $3.77 per share. ¶¶ 154–55. With just three days left in the first quarter at the time of the IPO, Lyft was undoubtedly aware that it was about to record the much larger than expected loss. *See Apple*, at *26 ("Absent some natural disaster . . . it is simply implausible that [defendant] would not have known [about declining demand] mere days before cutting production lines."). Lyft could not omit this material information for a number of reasons.

First, Defendants' authority does not support the proposition that Lyft was excused from disclosing a record loss simply because Lyft set the IPO to occur three days before quarter end. *In re Worlds of Wonder* involved a company that still had a *month* left in its quarter and, the Ninth Circuit observed, therefore could not have accurately predicted its performance, 35 F.3d at 1419, whereas *In re N2K Inc. Sec. Litig.*, 82 F. Supp. 2d 204, 209 (S.D.N.Y. 2000) concerned an alleged violation of Item 302, not Item 303.

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[38] Defendants misplace their reliance on *Stadnick v. Vivant Solar, Inc.,* 861 F.3d 31 (2d Cir. 2017) because Plaintiff does not allege that the omission of the metrics itself was misleading; Plaintiff alleges Lyft's failure to inform IPO investors that it would abandon the metrics misled investors. ¶¶ 147, 150. Plus, in *Vivant Solar,* the court expressly stated that the company disclosed other metrics that were "***[a] more accurate indicator of the company's performance***" than the omitted metrics. *Id.* at 38. This is a crucial distinction between *Vivint Solar* and this case. Here, Plaintiff alleges "***Lyft did not offer any other numbers that could provide visibility into the revenue breakdown***. . ." ¶ 150 (quoting article by financial analyst); *see also* ¶ 149 (analyst describing the increase in the company's "take rate" as a "a key challenge" and the company's abrupt decision to stop sharing that information as "a surprise.").

Second, Defendants' argument overly complicates the straightforward Section 11 materiality inquiry: would the omitted information "have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Basic*, 485 U.S. at 231-32. Viewed through the proper lens, Defendants mistakenly assert that the information was per se immaterial simply because three days remained in the quarter. The Supreme Court has rejected "bright-line" tests of materiality (*Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 39 (2011)) and the importance of this information to the reasonable investor was demonstrated when Lyft's share price plummeted *11%* on the May 8, 2019 disclosure that Lyft suffered such a dramatic loss.[39] ¶ 156.

Third, failures to disclose interim information are actionable under Item 303. *See, e.g., Panther Partners*, 681 F.3d at 122 (finding duty to disclose events occurring "in the weeks leading up to" the offering). The reasoning is sound. Otherwise, issuers could rush public offerings to beat the release of negative financial information, thus unjustly taking advantage of investors.

C. Market share statements were not truthful.

Lyft touted the company's explosive growth, claiming that its market share had nearly doubled (from 22% to 39%) from December 2016 to December 2018. ¶¶ 136–37. However, immediately following the IPO, several reports emerged casting strong doubt on Lyft's claims. For example, Second Measure, an independent credit-card based source that analyzes purchases from millions of anonymized U.S. shoppers, put Lyft's U.S. market share at closer to 28%. ¶ 139. An analyst report from Guggenheim Partners similarly estimated Lyft's U.S. market share to be 24% (¶ 140), casting serious doubt on Lyft's representations that its market share had nearly doubled since 2016. Following the Guggenheim analyst report, which was also featured prominently on CNBC.com, Lyft's stock price fell nearly 12%. *Id.*

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[39] Defendants' assertion that the loss was attributed to the disclosed compensation charges is baseless as it is not plausible that the stock price plummeted because of the disclosure of already disclosed information.

Plaintiff has adequately alleged that Lyft's market share disclosures were not truthful or, at a minimum, were misleading and omitted material information. *Miller*, 519 F.3d at 887 ("[I]nvestors are not generally required to look beyond a given document to discover what is true and what is not."). Accepting these well pled allegations as true, the AC adequately alleged that Lyft made material misrepresentations and omissions regarding the Company's market share. *See Berson*, 527 F.3d at 987 ("[O]nce defendants chose to tout the company's backlog, they were bound to do so in a manner that wouldn't mislead investors as to what that backlog consisted of.").

Defendants alternately try to distance themselves from Lyft's market share estimates, arguing "Lyft's market share figures are not actionable because they were presented as 'an unverified estimate by a third party,' not a statement of fact . . . ."[40] The argument is not persuasive, in part because the "third party" that provided the market share figures is an entity affiliated with Rakuten, ***Lyft's largest investor***. ¶ 137. Additionally, these market share estimates were, indeed, presented as fact. *See* ¶ 136 ("Our U.S. ridesharing market share was 39% in December 2018 . . . ."); *see also* ¶ 139 ("[O]ur values, brand, innovation and focused execution have driven increased ridesharing market share in the United States, growing from 22% in December 2016 to 39% in December 2018.").

D. Lyft's bike statements were materially false and misleading.

The Registration Statement highlighted Lyft's "Innovative Multimodal Platform," explaining that it included "a network of shared bikes and scooters in a number of cities to address the needs of riders who are looking for lower-priced, more active and often more efficient options for short trips during heavy traffic." ¶ 165. Lyft touted its "Innovative Multimodal Platform" as a key reason "Why Lyft Wins," explaining that by offering a breadth of multimodal transportation options, riders would be more likely to turn to Lyft for all their transportation needs and "Grow Our Share of Rider Transportation

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[40] Motion to Dismiss at 15.

Spend." ¶¶ 165–66. Lyft's expansion into the bikeshare market, which began with its $251 million acquisition of Motivate in late 2018 and a concurrent commitment to invest an additional $100 million in expanding New York City's bike share program (¶¶ 158–59), was of such significance Lyft identified it as the "key milestone" of 2018 (¶ 163) and it purportedly prompted a change in how the Company reported revenue (¶ 185). Lyft failed to disclose, however, that these growth plans were jeopardized by dangerous bike defects and maintenance failures (¶ 26), ultimately culminating in Lyft recalling its entire electronic bike fleet in April 2019 (¶ 176), and sending the Company's stock price tumbling (¶ 184).

Defendants four arguments as to why Plaintiffs' allegations regarding Lyft's bikeshare program do not state a Securities Act claim, as we discuss, lack merit.

1. Lyft described then-existing problems with its bike fleet as hypothetical.

Defendants' own argument makes clear that Lyft described present, then-existing problems as hypothetical risks: "bikes ***may*** contain defects . . . 'improper maintenance or repair' ***could*** interfere with bike performance, and . . . 'quality problems' ***may*** require withdrawing its bikes from service."[41] As alleged to the contrary, Lyft's bikes ***were already*** experiencing dangerous defects, improper repair, and maintenance lapses that seriously impaired the functioning of the bikeshare program, thus rendering the Company's disclosures materially misleading. ¶¶ 171–81. "To warn that the untoward may occur when the event is contingent is prudent; to caution that it is only possible for the unfavorable events to happen when they have already occurred is deceit." *Schulein*, 2012 WL 12884851, at *7 (quoting *Huddleston v. Herman & MacLean,* 640 F.2d 534, 544 (5th Cir. 1981); *see also Berson*, 527 F.3d at 986 (statement misleading where it "speaks entirely of as-yet-unrealized risks and contingencies" and fails to "alert[] the reader that some of these risks may already have come to fruition"); *see also Siracusano v. Matrixx*

[41] Motion to Dismiss at 18 (emphasis added).

Initiatives, Inc., 585 F.3d 1167, 1181 (9th Cir. 2009) *aff'd Matrixx*, 563 U.S. 27 ("[The risk disclosure] speaks about the risks . . . in the abstract, with no indication that the risk may already have come to fruition.") (internal quotations omitted).[42]

2. Defendants cannot meet the very high burden of demonstrating immateriality as a matter of law, which argument is, in any event, belied by the facts alleged.

Materiality is a "fact-specific inquiry" "that should [be] left to the trier of fact." *Matrixx*, 585 F.3d at 1178-79. Plaintiff has adequately alleged the materiality of the omitted information. *See* ¶¶ 165–66 (Lyft touted its "Innovative Multimodal Platform," which relied heaving on Lyft's "network of shared bikes and scooters," as a key reason "Why Lyft Wins"); *see also* ¶ 166 (S-1/A asserted that, due to the breadth of Lyft's multimodal transportation options, riders would be more likely to turn to Lyft for all their transportation needs and "Grow Our Share of Rider Transportation Spend."); ¶¶ 158–59 (Lyft committed $351 million to expand into the bikesharing market); ¶ 163 (bikeshare program identified by Lyft as the "key milestone" of 2018); ¶ 185 (expansion purportedly prompted change in revenue reporting). Even if Lyft's revenue from bikesharing was not yet a large component of overall revenue, the issues leading to the bike recall were a serious blow to the bike segment of Lyft's business and were therefore material. *Litwin v. Blackstone Grp., L.P.*, 634 F.3d 706, 720 (2d Cir. 2011) ("Even where a misstatement or omission may be quantitatively small compared to a registrant's firm-wide financial results, its significance to a particularly important segment of a registrant's business tends to show its materiality."). Plaintiff has adequately alleged materiality.

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[42] Contrary to Defendants' assertion (*see* Motion to Dismiss at 19), Plaintiff does not concede that Lyft "did not know" about the braking problem. *See* ¶ 172. The problem was unknown to *customers*. ¶ 175. Furthermore, knowledge is not a Section 11 element. *Fed. Deposit Ins. Corp.*, 2015 WL 1381875, at *8 ("[A]s numerous courts have held, whether defendants knew of the falsity or omission in exercising reasonable care is a question of fact that is not appropriate to resolve on a motion to dismiss.").

3. The risk disclosures regarding Lyft's bikeshare business were misleading.

Defendants' erroneously argue that Lyft's risk disclosures do not support a claim because: (a) Plaintiff does not allege that the warned-of risk "had already occurred"; (b) "any purported omission is *consistent with* Lyft's warnings that 'bikes. . . may contain defects'"; and (c) the disclosures state that there "can be no assurance" that Lyft will be able to detect and fix all defects.[43] As discussed above, to wit: (a) the AC adequately alleges that the undisclosed problems plaguing Lyft's bike fleet (*i.e.,* dangerous defects, improper repair, and maintenance lapses) jeopardized the Company's growth plans (*see, e.g.,* ¶ 26), which had been touted to investors; (b) Lyft's risk disclosures misleadingly presented then-existing, serious problems with Lyft's bikeshare business as hypothetical (*i.e.,* "bikes . . . ***may*** contain defects")[44]; and (c) a glib caveat that there "can be no assurance" that the Company will be able to detect and fix all defects does not immunize Defendants' omission of material information regarding the then-existing defects and related problems that dogged Lyft's bikeshare business.

4. Defendants' attempt to cast the misrepresentations and omissions as corporate optimism are unavailing.

Defendants wrongly assert that the statements in ¶¶ 161–69 are inactionable statements of corporate optimism. *First*, focusing on the specific statement that Defendants quote in their brief, "[w]e *are* committing to high safety standards,"[45] this is a statement of present fact and therefore actionable. *See Massey*, 883 F. Supp. 2d at 617-18 (statements about "past achievements and current goals" actionable). *Second*, Defendants paint with too broad a brush in challenging the statements at ¶¶ 161–69, as several statements are indisputably statements of fact. *See e.g.,* ¶¶ 167, 168. *Third,* "a party cannot

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[43] Motion to Dismiss at 20 (emphasis in original).
[44] *See Berson*, 527 F.3d at 986 (holding statement misleading that "speaks entirely of as-yet-unrealized risks and contingencies. Nothing alerts the reader that some of these risks may already have come to fruition").
[45] Motion to Dismiss at 20 (emphasis added).

affirmatively create a positive impression of an area it knows to be doing poorly." *Apple*, at *15. This is precisely what Lyft's statements about its bikeshare business did. For example, ¶ 161 states: "Through our acquisition of Motivate, the largest bike sharing platform in the United States, ***we are well-positioned to lead sustainable mobility in the markets we serve***." In truth, Lyft was not "well-positioned to lead sustainable mobility" in the bikeshare market, as evidenced by the problems and recalls that plagued Lyft's bikeshare program. ¶ 193. At a minimum, it was misleading for Lyft to make this claim without also disclosing the then-existing safety and maintenance issues that were effectively crippling the bikeshare program. As in *Apple,* Lyft "affirmatively create[d] a positive impression" regarding a thriving bikeshare business that would drive growth, when in fact Lyft knew that it was "doing poorly" in this area. *Apple*, at *15. The misrepresentations in ¶¶ 161–69 are actionable.

5. Lyft's bikeshare problems constituted a known trend or uncertainty that Defendants had a duty to disclose under Regulation S-K.

From the inception of the bikeshare program through the date of the IPO, Lyft's bike fleet was mired by defects and improper maintenance. ¶¶ 170–81. These repeated and mounting issues were known to Lyft.[46] ¶¶ 172, 175. Because Lyft's future growth "depend[ed]" on its bikeshare expansion, (¶¶ 187), and because New York *already* had the option to fine Lyft $1.4 million over bikeshare issues (¶ 174), the trend of bike maintenance issues and resultant uncertainty were materially impacting, and were reasonably likely to continue to impact, Lyft. *See Pirani*, 2020 WL 1929241, at *12-13 (finding Item 303 violation where Slack warned "continued growth depend[ed]" on reliability but did not disclose "reliability problem was not simply hypothetical but a known issue"); *Panther Partners*, 681 F.3d at 120-22 ("[I]ncreasing flow of highly negative information from key customers" in the weeks prior to

[46] Defendants argue against the existence of a "trend." Motion to Dismiss at 23. Whether the patterns Plaintiff alleges constitute a trend "is a factual inquiry for a later stage of these proceedings". *Pirani v. Slack Techs., Inc.*, 2020 WL 1929241, at *13 (N.D.Cal. Apr. 21, 2020).

offering created uncertainty for company's future revenues and reputation where product recall occurred after offering); *Silverstrand*, 707 F.3d at 104 (finding inference of reasonable likelihood of material impact from company's own risk disclosures).

E. The Registration Statement contained misleading statements and omissions concerning Lyft's treatment of drivers and the potential for labor disruptions.

Lyft touted itself as a "Driver-Centric" company, highlighted the ways it "help[ed] drivers maximize earnings" and enumerated "Key Benefits to Drivers," all of which suggested driver satisfaction to attract investors. ¶ 194. In doing so, Lyft misled investors by omitting extensive, negative information about driver dissatisfaction that manifested itself in labor unrest and driver strikes that disrupted operations. ¶ 198. Although Defendants argue driver unrest was disclosed, they do not point to a single disclosure in the Registration Statement related to labor unrest. As discussed in Section I.A.3., *supra,* Defendants cannot establish the media report they cite was sufficient to support a fact-intensive "truth on the market" defense, particularly on a motion to dismiss in a Securities Act case. Lyft also cannot claim information about labor unrest was, as a matter of law, either immaterial or otherwise known to the public, because following the announcement of another strike on May 8, 2019, Lyft's share price plummeted 11%. ¶ 201. *See Pirani*, 2020 WL 1929241, at *13 (finding stock price drop indicates materiality).

II. Plaintiff adequately alleges Section 11 damages.

Defendants argue, "Plaintiff's Section 11 claims based on safety, first quarter, and driver benefits statements should be dismissed because he has not alleged damages arising from them. Plaintiff can only recover in Section 11 for the decline in stock price through *April 15, 2019,* the date the first-filed complaint was brought."[47] Defendants' argument is devoid of merit, for several reasons.

[47] Motion to Dismiss at 24 (emphasis in original).

First, the date that "the first-filed complaint was brought" was ***not*** April 15, 2019. The first of the two actions that have been consolidated before this Court was filed on May 17, 2019. *See* ECF No. 1. The April 15th date on which Defendants rely is the date that a wholly separate action, pending in a separate court, that has not been consolidated with the present action, and which has no bearing on it, was filed in state court. Unsurprisingly, Defendants provide no support for the bold assertion that the present federal court action should import its filing date from this other matter. *See Beecher v. Able*, 435 F. Supp. 397, 401 (S.D.N.Y. 1975) ("[T]he time when the suit was brought was . . . the day on which the first of *these consolidated cases* was filed.") (emphasis added); *In re Barclays Bank PLC Sec. Litig.*, 2016 WL 3235290, at *2 (S.D.N.Y. June 9, 2016) (filing date for new plaintiff added to an existing action was the original filing date of *that action*). Accordingly, May 17, 2019 is the earliest possible date the current action could have been filed under Section 11(e). 15 U.S.C. § 77k(e).

Second, even if April 15th were the first-filed date, Section 11 does *not* provide that stock drops following the first-filed complaint are irrelevant to damages. Rather, Section 11(e) provides for a measure of damages equal to the difference between the price at which the security was offered to the public and the "***value thereof as of the time such suit was brought***." 15 U.S.C. § 77k(e). The "overwhelming majority of the courts in this and other Circuits analyzing the issue, including the only Court of Appeals to directly address the question, have held that 'value' and 'price' are not always identical." *In re Snap Inc. Sec. Litig.*, 2018 WL 3816764, at *2 (C.D.Cal. Aug. 8, 2018). Plaintiff alleges Lyft's share price on April 14 did not reflect the true ***value*** of the stock because the full extent of the sexual assault and other misrepresentations were not yet public. ¶¶ 17, 120, 140, 156, 184, 201.

Third, "[w]here the Plaintiff has alleged facts showing that the price of the stock is not an indicator of its value, the determination of value becomes a ***fact-intensive inquiry that cannot be resolved at the motion to dismiss stage***." *Campton v. Ignite Rest. Grp., Inc.*, 2014 WL 61199, at *5

(S.D.Tex. Jan. 7, 2014) (subsequent corrective disclosure showed market price was not a reliable indicator of value); *see also Snap*, 2018 WL 2972528, at *9. The *Snap* defendants similarly moved to dismiss asserting that plaintiffs had no damages. The court rejected the argument, explaining that the question of whether the value of the shares was equal to its market price was "***not an appropriate question" on a motion to dismiss because "'[v]alue,' . . . is not necessarily equal to 'price,' and the determination of value is a fact-intensive inquiry.***" *Id.; see also id.* at *8 ("argument about the lack of damages . . . is an affirmative defense that places a 'heavy burden' of proof on the defense.")

Fourth, Defendants cannot meet their burden of showing that no corrective information leaked into the market prior to April 14th, 2019, even if that were the first-filed date. *See In re WRT Energy Sec. Litig.*, 2005 WL 2088406, at *1 (S.D.N.Y. Aug. 30, 2005) (under Section 11 "any decline in value is presumed to be caused by the misrepresentation in the registration statement.") (internal quotations omitted). Indeed, Plaintiff has specifically alleged sexual assault disclosures began causing share price declines on April 8, 2019. ¶ 120.

Defendants' affirmative loss causation defense is therefore both premature and unavailing.

III. Section 15 claim.

Section 15 of the Securities Act imposes control person liability on those who control a primary violator under Sections 11 and 12.[48] 15 U.S.C. § 77o. Because Plaintiff has adequately alleged a Section 11 claim against Defendants, his Section 15 claim should also be sustained.

CONCLUSION

For the reasons set forth herein, the motion to dismiss should be denied. Should the Court conclude that Plaintiff has failed to state a claim, Plaintiff respectfully requests leave to amend.

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[48] Plaintiff has dismissed the Underwriter Defendants without prejudice (ECF No. 83). As to remaining Defendants, Plaintiff no longer asserts a Section 12 claim.

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